3.1 Disability Discrimination[48]

[Updated: 10/17/02]

Introductory Note

The following instruction for disability discrimination cases will require modification depending upon whether the case is a McDonnell Douglas pretext or a Price Waterhouse mixed motive case. See Instructions 1.1 – 1.2 for further discussion of the issues associated with the use of pretext and/or mixed motive instructions generally.

Pattern Jury Instruction

[Plaintiff] accuses [defendant] of disability discrimination. Specifically, [she/he] claims that [defendant] took adverse employment action against [her/him] because of disability discrimination.

In order to succeed on this claim, [plaintiff] must persuade you, by a preponderance of the evidence, of all of the following:

> First, [plaintiff] [had; had a record of having; was viewed as having][49] [specify alleged impairment(s)];[50]
>
> Second, [specify alleged impairment] substantially limited [plaintiff]'s ability to [specify major life activity or activities affected];[51]
>
> Third, [plaintiff] was a qualified individual, which means [he/she] could have performed the essential functions[52] of [specify job held or position sought] at the time [defendant] [specify adverse action] {if [defendant] had made reasonable accommodations for [plaintiff]'s disability}[53];
>
> Fourth, [defendant] knew that [plaintiff] had [specify alleged impairment]; and

{Choose one of the following two bracketed sentences, depending on whether the case is a pretext or a mixed motive case (Note: a similar choice/modification must be made at the end of the instruction depending on whether the case is a pretext or a mixed motive case.):

> [54]{Fifth, that were it not for [plaintiff]'s disability, [defendant] would not have taken adverse employment action against [him/her].}
>
> [55]{Fifth, that [plaintiff]'s disability was a motivating factor in [defendant]'s decision to take adverse employment action against [him/her].}}

A person is substantially limited if he or she is [unable to; significantly restricted in the ability to][56] [specify major life activity affected]. In determining whether [plaintiff]'s impairment substantially limits [his/her] ability to [specify major life activity affected], you should compare

[plaintiff]'s ability[57] to [specify major life activity affected] with that of the average person. In doing so, you should also consider: (1) the nature and severity of the impairment; (2) how long the impairment will last or is expected to last; and (3) the permanent or long-term impact, or expected impact, of the impairment.[58] Temporary impairments with little or no long-term impact are not sufficient.[59] It is not the name of an impairment or condition that matters, but rather the effect of that impairment or condition on the life of [plaintiff].[60]

In order to decide what the essential functions of a job are, you may consider the following factors:[61] [(1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of people who have held the job; (7) the current work experience of people in similar jobs; (8) whether the reason the position exists is to perform the function; (9) whether there are a limited number of employees available among whom the performance of the function can be distributed; (10) whether the function is highly specialized and the individual in the position was hired for his or her expertise or ability to perform the function; and (11) (list any other relevant factors supported by the evidence)]. No one factor is necessarily controlling. You should consider all of the evidence in deciding whether a job function is essential.

[62]{An "adverse employment action" is one that, standing alone, actually causes damage, tangible or intangible, to an employee. The fact that an employee is unhappy with something his or her employer did or failed to do is not enough to make that act or omission an adverse employment action.[63] An employer takes adverse action against an employee only if it: (1) takes something of consequence away from the employee, for example by discharging or demoting the employee, reducing his or her salary, or taking away significant responsibilities; or (2) fails to give the employee something that is a customary benefit of the employment relationship, for example, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.[64]}

[65]{Reasonable Accommodations}

{For a pretext case, insert the last 3 paragraphs of Instruction 1.1. For a mixed motive case, insert the last 5 paragraphs of Instruction 1.2.}

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[48] This instruction is designed for disability discrimination cases. Although these notes discuss disability discrimination in terms of Title I of the Americans with Disabilities Act ("ADA") (the First Circuit has not yet decided whether a public employee can sue under Title II, Currie v. Group Ins. Comm'n, 284 F.3d 251, 256-57, 263-64 (1st Cir. 2002) (ADA) (Lynch, J.)), the same instruction should be usable in a Rehabilitation Act case. See Kvorjak v. Maine, 259 F.3d 48, 50 n.1 (1st Cir. 2001) (ADA) (Coffin, J.) ("the standards applicable to [the Americans with Disabilities Act and the Rehabilitation Act] have been viewed as essentially the same"); Oliveras-Sifre v. Puerto Rico Dep't of Health, 214 F.3d 23, 25 n.2 (1st Cir. 2000) (ADA and Rehabilitation Act) (Coffin, J.) ("An employment discrimination claim under . . . the Rehabilitation Act is analyzed under the same standards applicable to . . . the ADA. We therefore do not separately consider the Rehabilitation Act claim." (internal citation omitted)). The Introductory Notes at the beginning of these instructions outline the statutory basis for disability discrimination claims.

[49] A person has a disability, and therefore qualifies for protection under the ADA, if that person has: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record

of such an impairment; or (C) [is] regarded as having such an impairment." 42 U.S.C. §§ 12102(2), 12112; see, e.g., Sutton v. United Air Lines, Inc., 527 U.S. 471, 489-90 (1999) (ADA) (O'Connor, J.) (discussing the "regarded as having" standard); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521-25 (1999) (ADA) (O'Connor, J.) (same); Bailey v. Georgia-Pacific Corp., No. 02-1063, 2002 WL 31259497, at *3-7 (1st Cir. Oct. 9, 2002) (same); Santiago Clemente v. Executive Airlines, Inc., 213 F.3d 25, 33-34 (1st Cir. 2000) (ADA) (Campbell, J.) (discussing and rejecting plaintiff's arguments that she had a record of impairment and that she was regarded as having an impairment). These terms are defined further in the Equal Employment Opportunity Commission ("EEOC") ADA guidelines. See 29 C.F.R. § 1630.2(k)-(l) (2002). It should be noted, however, that the Supreme Court has issued a caution about the authority of some sections of the EEOC guidelines. In Sutton, 527 U.S. at 478-80, the Court noted that "the EEOC has authority to issue regulations to carry out the employment provisions in Title I of the ADA, §§ 12111-12117, pursuant to § 12116" but it has not "been given authority to issue regulations implementing the generally applicable provisions of the ADA, see §§ 12101-12102, which fall outside Titles I-V." Later, in Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 122 S. Ct. 681, 689 (2002) (ADA) (O'Connor, J.), the Court, citing Sutton, observed: "The persuasive authority of the EEOC regulations [defining the term 'disability'] is less clear. . . . [N]o agency has been given authority to issue regulations interpreting the term 'disability' in the ADA. Nonetheless, the EEOC has done so."

[50] The term "physical or mental impairment" is not defined in the statute. The EEOC has defined a "physical or mental impairment" as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h); see also Bragdon v. Abbott, 524 U.S. 624, 631-32 (1998) (Kennedy, J.) (using 28 C.F.R. § 41.31(b)(1) definition of impairment in ADA case). See Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 122 S. Ct. 681, 689-90 (2002) (ADA) (O'Connor, J.), for a discussion of other possible sources for a definition of "physical or mental impairment." The jury charge should select only the relevant language from these definitions. The First Circuit has said: "There is no question that alcoholism is an impairment for purposes of the first prong of analysis under the ADA," Bailey v. Georgia-Pacific Corp., No. 02-1063, 2002 WL 31259497, at *3 (1st Cir. Oct. 9, 2002), but also said that it was not "a *per se* disability." Id. at *4.

[51] The Supreme Court has defined "major life activity" to include "those activities that are of central importance to daily life." Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 122 S. Ct. 681, 691 (2002) (ADA) (O'Connor, J.). The Court cautioned, however, "[t]hat these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled." Id. The EEOC regulations define a "major life activity" as a "function[] such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

There is some confusion about whether working is a major life activity. The Supreme Court has declined to rule on whether working is a major life activity. Toyota, 534 U.S. 184,122 S. Ct. at 692; Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999) (ADA) (O'Connor, J.). At times the First Circuit has acknowledged this uncertainty, see Gelabert-Ladenheim v. American Airlines, Inc., 252 F.3d 54, 58 (1st Cir. 2001) (ADA) (Lynch, J.); Lebron-Torres v. Whitehall Laboratories, 251 F.3d 236, 240 (1st Cir. 2001) (ADA) (Campbell, J.) (acknowledging difficulty but concluding that work is a major life activity), while at other times it has not. See Rivera-Rodriguez v. Frito Lay Snacks Caribbean, 265 F.3d 15, 23 (1st Cir. 2001) (Title VII, ADA, and ADEA) (Tauro, Dist. J., D. Mass.) (observing that "the EEOC recognizes working as a 'major life activity'" but upholding grant of summary judgment for defendant because plaintiff's impairments did not substantially limit his ability to work); Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 10 (1st Cir. 1999) (ADA) (Cyr, J.) (holding that plaintiff was entitled to recover on ADA claim based on major life activity of working). If working is considered a major life activity within the meaning of the ADA, a plaintiff must "show an inability to work in a 'broad range of jobs,' rather than a specific job." Toyota, 534 U.S. 184, 122 S. Ct. at 693 (citing Sutton, 527 U.S. at 492); see also 29 C.F.R. § 1630.2(j)(3)(i) ("With respect to the major life activity of working . . . [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. . . . The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 524-25 (1999) (ADA) (O'Connor, J.) (upholding summary judgment for

defendant where plaintiff's hypertension prevented him from working as one type of mechanic but did not affect his ability to work as a mechanic generally); Tardie v. Rehabilitation Hosp. of R.I., 168 F.3d 538, 541-42 (1st Cir. 1996) (ADA) (Torruella, C.J.) (holding that plaintiff's inability to work more than 40 hours a week did not substantially limit her in the major life activity of working). In Gelabert-Ladenheim, 252 F.3d at 58-59, the First Circuit observed that:

> [W]hen the question of whether someone is disabled turns on the plaintiff's ability to work, the very existence of the disability turns on factors beyond simply the physical characteristics of the plaintiff. So, arguably, different results could be reached with respect to plaintiffs who suffer from identical physical impairments but who, due to a variety of factors like the economic health or geographic location of an area, face dissimilar employment prospects.

Furthermore, "[a]n otherwise valid job requirement, such as a height requirement, does not become invalid simply because it would limit a person's employment opportunities in a substantial way if it were adopted by a substantial number of employers." Sutton, 527 U.S. at 493-94. For a listing of some criteria see Bailey v. Georgia-Pacific Corp., No. 02-1063, 2002 WL 31259497, at *4 (1st Cir. Oct. 9, 2002) ("accessible geographic area, the numbers and types of jobs in the area foreclosed due to the impairment, and the types of training, skills, and abilities required by the jobs").

The following cases discuss whether specific activities constitute major life activities: Toyota, 534 U.S. 184, 122 S. Ct. at 691 ("manual tasks"); Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 21-24 (1st Cir. 2002) (ADA) (Selya, J.) (lifting); Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, P.C., 258 F.3d 30, 34 (1st Cir. 2001) (ADA) (Coffin, J.) (learning); Criado v. I.B.M. Corp, 145 F.3d 437, 442-43 (1st Cir. 1998) (ADA) (Godbold, J.) (sleeping); Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 155 (1st Cir. 1998) (ADA) (Lynch, J.) (learning); Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997) (ADA) (Lynch, J.) ("ability to get along with others").

[52] For elaboration of the "essential functions" requirement, see Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 24-25 (1st Cir. 2002) (ADA) (Selya, J.)

[53] The bracketed language may be used in cases where reasonable accommodations are a disputed issue.

[54] This bracketed sentence should be used in a pretext case. See Instruction 1.1.

[55] This bracketed sentence should be used in a mixed motive case. See Instruction 1.2.

[56] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 134, 122 S. Ct. 681, 691 (2002) (ADA) (O'Connor, J.) ("[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term."). However, plaintiffs need not:

> undergo actual physical assessments of their respective capacities to engage in particular major life activities in order to establish that their ability to do so is limited. On the contrary, … an ADA plaintiff may demonstrate that her own preemptive decision to limit or refrain from a major life activity was necessary to avoid placing herself or others at imminent risk of physical injury.

Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 10 (1st Cir. 1999) (ADA) (Cyr, J.). A plaintiff need not provide medical evidence if the existence of an impairment is obvious. Katz v. City Metal Co., Inc., 87 F.3d 26, 31 (1st Cir. 1996) (ADA) (Bownes, J.) (plaintiff who had heart attack not required to provide evidence that he "had a condition affecting the cardiovascular system and therefore that he had a physical impairment under the ADA"). Furthermore, although testimony from a vocational rehabilitation expert is persuasive, it is not strictly required. Lebron-Torres v. Whitehall Laboratories, 251 F.3d 236, 240-41 (1st Cir. 2001) (ADA) (Campbell, J.).

[57] The assessment of the severity of any condition must include the effect of any corrective measures. Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (ADA) (O'Connor, J.) ("[I]f a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999) (ADA) (O'Connor, J.) (same).

[58] 29 C.F.R. § 1630.2(j) cited in Santiago Clemente v. Executive Airlines, Inc., 213 F.3d 25, 30-31 (1st Cir. 2000) (ADA) (Campbell, J.); see also Eighth Circuit Model Instruction 5.52C (2001). "Furthermore, to determine whether a substantial limitation exists when work is at issue, we have looked to whether plaintiff can show that he or she is significantly restricted in his or her ability to perform 'a class of jobs' or 'a broad range of jobs in various classes.'" Carroll v. Xerox Corp., 294 F.3d 231, 239 (1st Cir. 2002). A plaintiff must be precluded from more than a particular

job, id. (citing Santiago Clemente, 213 F.3d at 32), or a narrow range of jobs. Id. at * 7 (citing Tardie v. Rehabilitation Hosp. of R.I., 168 F.3d 538, 542 (1st Cir. 1997)).

[59] Santiago Clemente v. Executive Airlines, Inc., 213 F.3d 25, 31 (1st Cir. 2000) (ADA) (Campbell, J.) ("Although short-term, temporary restrictions generally are not substantially limiting, an impairment does not necessarily have to be permanent to rise to the level of a disability. Some conditions may be long-term or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, *if severe*, may constitute disabilities." (citing Katz v. City Metal Co., Inc., 87 F.3d 26, 31 (1st Cir.1996) (ADA) (Bownes, J.) (citing 2 EEOC Compliance Manual, Interpretations (CCH) § 902.4, ¶ 6884, at 5319 (1995)))).

[60] Whether a person is disabled should be based on an individualized assessment of the impact of the physical condition on that specific person's capacity, rather than a generalized classification of the particular medical diagnosis. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 122 S. Ct. 681, 685 (2002) (ADA) (O'Connor, J.) ("It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those claiming the Act's protection to prove a disability by offering evidence that the extent of the limitation caused by their impairment in terms of their own experience is substantial." (internal quotation marks omitted)).

[61] See 29 C.F.R. § 1630(n); Eighth Circuit Model Instruction 5.52B (2001); see also Ward v. Massachusetts Health Research Institute, 209 F.3d 29, 34 (1st Cir. 2000) (ADA) (Torruella, C.J.) (an employer's description of a job's essential functions is given substantial weight, but other factors to consider include "written job descriptions, consequences of not requiring the function, work experience of past incumbents, and work experience of current incumbents"). Although attendance, generally, is an essential job function, see Leary v. Dalton, 58 F.3d 748, 753 (1st Cir. 1995) (Rehabilitation Act) (Bownes, J.), adherence to a fixed schedule may not be essential for some jobs. See Ward, 209 F.3d at 34.

The jury charge should select only the relevant factors from this list.

[62] This bracketed paragraph may be used in cases where there is a dispute about whether the action that the defendant allegedly took against the plaintiff constituted an adverse employment action. Although this question, if it arises, is one for the jury, see Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (Boudin, C.J.) (jury could find that plaintiff who was given a raise but assigned less challenging, largely menial responsibilities suffered an adverse employment action), in most cases the dispute will be about whether the defendant's challenged conduct was motivated by discriminatory animus, not whether it amounted to an adverse employment action. If there is no dispute about whether the alleged conduct, if proven, would constitute an adverse employment action, the bracketed paragraph may be deleted and the generic references to "adverse employment action" may be replaced by a brief description of the adverse employment action defendant allegedly took.

[63] Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA) (Selya, J.) ("[T]he inquiry must be cast in objective terms. Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.").

Blackie uses the term "materially adverse employment action," but does not define the term (or, more precisely, the significance of the word "materially") beyond what is included in the text of this instruction. Two other cases also use the modifier "materially" when discussing adverse employment actions (both cases take the language from Blackie), but neither of these cases indicates that a materially adverse employment action is different from an adverse employment action. Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 49-50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (Cyr, J.) (applying Title VII definition of adverse employment action); Larou v. Ridlon, 98 F.3d 659, 663 n.6 (1st Cir. 1996) (First Amendment political discrimination) (Cyr, J.) (applying, with reservation, Blackie definition of adverse employment action). Furthermore, none of these three cases uses the term "materially adverse employment action" exclusively; all three cases describe employment actions as "materially adverse" and "adverse" interchangeably. Other employment discrimination cases decided after Blackie have referred to adverse employment action without the modifier "materially." See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 33 (1st Cir. 2001) (Title VII and section 1981) (Cyr, J.); Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 53-54 (1st Cir. 2000) (ADEA) (Selya, J.); White v. New Hampshire Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII) (Bownes, J.).

[64] Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA) (Selya, J.). As the Blackie court noted, this definition is generalized because "[d]etermining whether an action is materially adverse necessarily requires a case-by-case inquiry." Id. Consequently, although there is little explicit guidance in the case law about what constitutes an adverse employment action, there are a number of cases that, by their factual holdings, help define the term. For example, in the majority of cases, the court does not explicitly analyze whether the challenged conduct constitutes an adverse employment action, presumably because certain actions, such as layoffs, salary reductions, and

demotions, are generally recognized as adverse employment actions. See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23 (1st Cir. 2001) (Title VII and section 1981) (Cyr, J.) (termination); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15 (1st Cir. 1999) (Title VII) (Torruella, C.J.) (demotion); Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999) (salary reduction); see also Welsh v. Derwinski, 14 F.3d 85, 86 (1st Cir. 1994) (ADEA) (Per Curiam) ("Most cases involving a retaliation claim are based on an employment action which has an adverse impact on the employee, i.e., discharge, demotion, or failure to promote."). More helpful, though, are the cases where the court decided whether a jury could reasonably find that the challenged actions constitute adverse employment actions. In some cases, the court has defined what actions are insufficient to constitute an adverse employment action by upholding a trial court's conclusion that the defendant's conduct was not, as a matter of law, actionable. See, e.g., Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998) (Title VII) (Schwarzer, Sr. Dist. J., N.D. Cal.) (plaintiff was subjected to increased email messages, disadvantageous assignments and "admonition that [he] complete his work within an eight hour [day]"); Blackie, 75 F.3d at 726 (plaintiffs claimed defendants refused to negotiate a "side agreement" to supplement their employment contract); Connell v. Bank of Boston, 924 F.2d 1169, 1179 (1st Cir. 1991) (ADEA) (Campbell, J.) (plaintiff who had already been fired and whose severance package was already calculated was forced to leave office two weeks early). In another useful class of cases, the court held that the challenged employment action could constitute an adverse employment action by either upholding a jury verdict for the plaintiff, see, e.g., White v. New Hampshire Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII) (Bownes, J.) ("ample evidence" of adverse employment action where plaintiff was harassed, transferred without her consent, not reassigned to another position, "and ultimately constructively discharged"), or holding that the defendant was not entitled to summary judgment on this issue. See, e.g., Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (Boudin, C.J.) (plaintiff given standard salary increase but assigned less challenging, largely menial responsibilities); DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997) (Title VII) (Bownes, J.) (plaintiff given five month assignment to job for which he had no experience and deprived of meaningful duties); Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (Title VII) (Boudin, J.) (defendant refused to grant plaintiff a hardship transfer); see also Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 48, 50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (Cyr, J.) (plaintiff given negative performance evaluations and deprived of responsibility for major account) (applying Title VII definition of adverse employment action).

[65] Insert the appropriate language from Instruction 3.2 when reasonable accommodations are a disputed issue.